Supreme Court, U.S.

No. 01 348 AUG 17 2001

OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

JOE CARRABBA, JR., ET AL.,
Individually and on Behalf of
All Others Similarly Situated, *Petitioners*,

v.

RANDALLS FOOD MARKETS, INC., *Respondent*.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM WHITEHILL
(*Counsel of Record*)
ROBERT WRIGHT
STACY OBENHAUS
GARDERE WYNNE SEWELL LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4761
(214) 999-3000
Counsel for Petitioners

28 pp

QUESTION PRESENTED

Where a court determines that an ERISA plan contains illegal terms, may that court nevertheless apply those illegal terms when determining a plan participant's claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B)?

PARTIES TO THE PROCEEDINGS BELOW

Appellants/Cross-Appellees/Plaintiffs:

Joe Carrabba, Jr., Joe Melton, Craig McKnight, Robert H. Burrows, Barbara A. Williams, Loyd Wellesley, Willard P. Correll, Bruce Philpot, J Bruce Gray, Rick Williams, A. Joe Cutrer, Roberto G. Fernandez-Vinas, Thomas D. McCarthy, Wylie Holmes, Dave Cooper, Ed Fortner, Jack D. Neal, Floyd E. Fulcher, Jack W. Sprabary, Robert L. Stockton, Carroll E. Brown, Michael J. Hammer, Scott E. Peterson, William H. Mansfield, James S. Standifer, Bettie J. Garrett, Cherie J. Stowe, Arvil R. Martin, Sanford W. Maynard, Denise P. Miller, Everett G. Grosgebauer, Gregory E. Smith, Michael Chessmore, Ima Dell Irvin, all individually and on behalf of all others similarly situated.

Appellee/Cross-Appellant/Defendant:

Randalls Food Markets, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 5

A. The ERISA Plan and Its Termination. 5

B. Proceedings Below. 7

REASONS FOR GRANTING THE PETITION 11

A. The Fifth Circuit's Treatment of Illegal ERISA Plan Terms Ignores ERISA and Conflicts With Third Circuit Law 11

B. The Fifth Circuit Decision Violates Critical ERISA Principles This Court Has Affirmed. 14

C. The Fifth Circuit Decision Erroneously Gave Effect to Illegal Terms to Deny the Section 1132(a)(1)(B) Claim for Benefits 16

CONCLUSION 21

TABLE OF AUTHORITIES

CASES: PAGE

Air Line Pilots Association International v. Delta Air Lines, Inc.,
863 F.2d 87 (D.C. Cir. 1988) 12

Arakelian v. National Western Life Insurance Co.,
755 F. Supp. 1080 (D.D.C. 1990) 12

Carrabba v. Randalls Food Markets, Inc.,
252 F.3d 721 (5th Cir. 2001) 1, 10

Carrabba v. Randalls Food Markets, Inc.,
145 F. Supp. 2d 763 (N.D. Tex. 2000) 1, 7, 8

Carrabba v. Randalls Food Markets, Inc.,
38 F. Supp. 2d 468 (N.D. Tex. 1999) 1, 7

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.,
472 U.S. 559 (1985) 14, 17

Ches v. Archer,
827 F. Supp. 159 (W.D.N.Y. 1993) 12

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 16

In re Goff,
812 F.2d 931 (5th Cir. 1987) 16

Gruby v. Brady,
838 F. Supp. 820 (S.D.N.Y. 1993).....12

Hollingshead v. Burford Equipment Co.,
809 F. Supp. 906 (M.D. Ala. 1992) 18

Hollingshead v. Burford Equipment Co.,
747 F. Supp. 1421 (M.D. Ala. 1990) 13

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995).....12

Northeast Department ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund,
764 F.2d 147 (3d Cir. 1985).....11, 12

Pilot Life Insurance Co. v. Dedeaux,
481 U.S. 41 (1987).....16

Rhorer v. Raytheon Eng'rs and Constructors, Inc.,
181 F.3d 634 (5th Cir. 1999).....20

Spacek v. Maritime Association ILA Pension Plan,
134 F.3d 283 (5th Cir. 1998).....6, 16, 20

Tolson v. Avondale Industrial, Inc.,
141 F.3d 604 (5th Cir. 1998).....20

Varity Corp. v. Howe,
516 U.S. 489 (1996).....16, 20

Waller v. Blue Cross of California,
32 F.3d 1337 (9th Cir. 1994).....17

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 7

29 U.S.C.A. § 1002(19) (West 1999) 2, 3, 6, 18

29 U.S.C.A. §§ 1051(2), 1081(a)(3), 1101(a)(1) (West 1999) 5

29 U.S.C.A. § 1053(a), (b) (West 1999) 17, 18

29 U.S.C.A. § 1054(a), (b) (West 1999) 19

29 U.S.C.A. § 1102(a) (West 1999) 19, 20

29 U.S.C.A. § 1104(a)(1)(D) (West 1999) 3, 8, 11, 17, 21

29 U.S.C.A § 1132(a)(1) (West 1999) ..... ii, 3, 5, 7, 8, 16, 20, 21

OPINIONS AND JUDGMENTS BELOW

A separate appendix to this petition contains the opinions that the courts below issued. The opinions are as follows:

Carrabba v. Randalls Food Markets, Inc., 38 F. Supp. 2d 468 (N.D. Tex. 1999) (liability)

Carrabba v. Randalls Food Markets, Inc., 145 F. Supp. 2d 763 (N.D. Tex. 2000) (relief)

Carrabba v. Randalls Food Markets, Inc., 252 F.3d 721 (5th Cir. 2001)

JURISDICTION

The court of appeals entered its judgment on May 22, 2001. No party filed a petition for rehearing. This Court's jurisdiction to review the court of appeals' judgment arises from 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C.A. § 1002(19) (West 1999):

The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contribution shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3) [29 USC § 1053(a)(3)].

29 U.S.C.A. § 1002(21)(A) (West 1999):

(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1) of this title.

29 U.S.C.A. § 1002(23)(A) (West 1999):

The term "accrued benefit" means—
(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3) [29 USC § 1054(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age.

29 U.S.C.A. § 1104(a)(1)(D) (West 1999):

Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

. . . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C.A. § 1132(a)(1) (West 1999):

A civil action may be brought—

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

STATEMENT OF THE CASE

The petitioners were the plaintiffs below. They worked for a supermarket chain owned and operated by Randalls Food Markets, Inc., and participated a company sponsored ERISA pension plan. When Randalls terminated the plan, it invoked illegal plan provisions to forfeit retirement benefits the plan had promised.

The district court agreed that Randalls had wrongfully forfeited plaintiffs' retirement benefits, but in determining the type of relief to award, the court used the same plan provisions it had held were illegal to deny plaintiffs' claim for benefits under 29 U.S.C. § 1132(a)(1)(B). When the Fifth Circuit affirmed this decision on appeal, it created a conflict with Third Circuit law and also sanctioned a departure from this Court's own mandate that ERISA plan participants receive what they've been promised in the way of retirement benefits.

A. The ERISA Plan and Its Termination.

Originally, the plaintiffs worked for and the plan was administered by Cullum Companies, Inc. ("Cullum"). Cullum had created the plan as a so-called "top hat" plan, i.e., a plan that "is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C.A. §§ 1051(2), 1081(a)(3), 1101(a)(1) (West 1999). "Top hat" plans are intended for high-level employees

whose bargaining power alleviates the need for ERISA protection, so ERISA excludes such plans from the normal requirements regarding funding, reporting, disclosure, and nonforfeitability of benefits. *See Spacek v. Maritime Ass'n ILA Pension Plan*, 134 F.3d 283, 290 (5th Cir. 1998).

Despite ERISA's expressed intent that "top hat" plans be limited to this select group of high-level employees, over the years Cullum invited employees at nearly all employment levels to participate in the plan. Thus, in addition to some of its top management, Cullum included hourly and non-managerial employees such as stockers, secretaries, bakers, clerical employees, an executive chef, mechanics, security guards, butchers, maintenance workers, and even a chauffer.

Over the years, Cullum distributed plan agreements, benefit statements, brochures, and other materials to the plan participants, promising them substantial benefits if they remained employed with Cullum until retirement. However, because it was purportedly a "top hat" plan, Cullum's ERISA plan—referred to in the record as the Management Security Plan or "MSP"—did not include any ratable vesting or accrual schedules and instead contained an illegal forfeiture provision. That is, the plan stated that all the promised benefits were forfeitable if the plan was terminated or the participant ceased to be an employee before retirement. This provision, while permissible in a "top hat" plan, violates 29 U.S.C. § 1002(19) (defining nonforfeitable benefits), § 1053(a) (minimum vesting

standards), and § 1054 (minimum accrual rate tests) and is therefore illegal in ERISA pension plans.

Shortly after Randalls bought Cullum, it terminated the plan and paid out minimal benefits to the plan participants, in sums far below what the plan promised, excluding its illegal terms. Approximately half of the participants received merely the amount they contributed to the plan, without interest.

B. Proceedings Below.

The plaintiffs filed a class action in U.S. District Court and sought to recover on behalf of all the ERISA plan participants the retirement benefits that Randalls had forfeited when it terminated the plan. The lawsuit invoked 29 U.S.C. § 1132(a)(1)(B), so the district court had jurisdiction under 28 U.S.C. § 1331.

The district court certified a class composed of plan participants (or their beneficiaries) employed by Randalls when it terminated the plan. Following a trial before the court, the court issued a written opinion and held that the plan was *not* an ERISA "top hat" plan and thus was not exempt from ERISA's nonforfeiture, vesting, accrual, reporting, disclosure, and funding requirements. *Carrabba v. Randalls Food Markets, Inc.*, 38 F. Supp. 2d 468, 478 (N.D. Tex. 1999).

The district court then re-certified the class for all remaining issues (29 R. 7035-44). After conducting a damages trial, the court issued another written opinion granting relief. *See Carrabba v. Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763 (N.D. Tex. 2000). The court

concluded that "the Class did not receive the financial benefits they should and would have received upon termination of the plan in 1992 if the plan sponsor had recognized that the MSP was subject to the accrual and vesting requirements of ERISA and had acted accordingly." *Id.* at 766. The court opined that, because Cullum had drafted the plan as a "top hat" plan rather than a standard ERISA plan, the plan "lacked the vesting and accrual provisions mandated by ERISA." *Id.* at 768.

Nevertheless, the court declined to grant plaintiffs a recovery of plan benefits pursuant to 29 U.S.C. § 1132(a)(1)(B), which creates a breach of contract type remedy, and decided instead to grant recovery under section 1132(a)(3)(B), which gives the court *equitable* power to fashion appropriate relief for a violation of ERISA. The court refused to award the plaintiffs the present value of the benefits that the plan's lawful terms had promised. The court reasoned: "If recovery under the terms of the MSP were the nature of plaintiffs' action, they would recover very little because there is no evidence that upon termination of the MSP they did not receive basically everything to which they were entitled *under the provisions of the MSP*." 145 F. Supp. 2d at 770 (emphasis added). In so holding, the court refused to address ERISA's mandate expressed in 29 U.S.C. § 1104(a)(1)(D) that plan fiduciaries (and thus reviewing courts) must ignore illegal terms in ERISA plans and enforce those plans as though the illegal terms never existed.

In short, the court held (without citing any supporting authority) that in awarding plan benefits

under section 1132(a)(1)(B), a court must construe the terms of a plan as written, including terms that violate ERISA. The court concluded that because the illegal clause authorized forfeiture of promised benefits, a section 1132(a)(1)(B) award of benefits would not include the forfeited benefits.

The plaintiffs had requested approximately $47.3 million, the unpaid present value of the $180 million in benefits that the plan had promised. The district court instead awarded the class $6.7 million as equitable relief, pre-judgment interest on that amount, and attorneys' fees. The award regarded all plaintiffs as fully vested and was calculated using a hypothetical accrual method that theoretically could have been but never was adopted by Cullum or disclosed to the participants.

In effect, the court allowed Randalls to retroactively create a new plan specifically designed to produce the least generous accrual method allowed under ERISA and acted as if the plaintiffs had consciously and voluntarily participated in this hypothetical plan in making their retirement decisions. The court acted as if Cullum had provided the plaintiffs with benefit statements relating to the hypothetical plan, had qualified the hypothetical plan for tax purposes, had properly funded the plan, and had made appropriate disclosures and reports during the life of the plan.

On appeal, the plaintiffs argued that in assessing a claim for pension benefits courts should ignore illegal plan provisions and enforce the remaining plan terms

and award benefits according to the plan's remaining legal terms and according to other applicable ERISA mandates. Ignoring the illegal forfeiture provision and pursuant to ERISA's express requirements, plaintiffs' promised benefits were accrued at plan termination, there being no lawful accrual limitations in the plan as a condition to receipt of the promised benefits. Thus, the appropriate relief was the present value of the promised benefits at plan termination based on the lawful plan provisions.

However, the court of appeals in a *per curiam* opinion affirmed the district court without writing its own opinion. *Carrabba v. Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001). Rather, the court expressly affirmed the district court "based on that court's conscientious, well-reasoned opinions, which will be published." *Id.* at 771-72. In short, the court of appeals adopted the district court decision as a correct statement of ERISA law. In doing so, the Fifth Circuit ignored ERISA's express provisions, created a direct conflict with Third Circuit law, and ignored this Court's mandate.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's Treatment of Illegal ERISA Plan Terms Ignores ERISA and Conflicts With Third Circuit Law.

ERISA provides in 29 U.S.C. § 1104(a)(1)(D) that ERISA fiduciaries (and thus courts reviewing a fiduciary's conduct) are to discharge their duties regarding a plan "solely in the interest of the participants and beneficiaries and—(D) in accordance with the documents and instruments governing the plan insofar as such documents are instruments are consistent with the provisions of this title [ERISA]."

In *Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985), the Third Circuit Court of Appeals addressed the specific application of section 1104(a)(1)(D) to a claim for benefits due under an ERISA plan. The Fifth Circuit decision in the present case specifically contradicts this Third Circuit decision. Moreover, the Fifth Circuit decision contradicts similar ERISA cases regarding what to do with illegal plan provisions in assessing the propriety or amount of relief in an ERISA case and conflicts with section 1104(a)(1)(D) itself.

The issue in *Northeast Department ILGWU Health & Welfare Fund* was the effect of competing "other insurance" provisions in separate ERISA plans, both of which purported to cover the employee's medical costs. One provision was an "excess clause" while the other was an "escape clause" providing that the plan

fiduciary could deny all insurance coverage to a participant covered by a spouse's group insurer if the spouse had paid for less than 50% of the cost of that coverage. The Third Circuit held that the escape clause violated ERISA. Accordingly, the court ignored the escape clause and determined the employee's plan benefits without reference to it: "In the absence of its escape clause, the ILGWU plan is the primary insurer of Mrs. Fazio's medical expenses . . ." *Id.* at 163-64.

The Fifth Circuit decision in the present case conflicts directly with the Third Circuit. Confronted with an illegal forfeiture provision in an ERISA plan, the Fifth Circuit gave effect to the illegal provision and accordingly denied the plaintiffs a section 1132(a)(1)(B) claim for plan benefits in the present value of what the plan had promised them at retirement. Confronted with this same issue, the Third Circuit, upon holding the illegal provision unenforceable, followed the language of ERISA and gave the illegal provision no effect when the court determined the claim for plan benefits.

In addressing the effect courts should give to illegal terms in ERISA plans in other contexts, courts have repeatedly concluded that the illegal terms should have no effect. Plan administrators simply cannot hide behind documents that are inconsistent with ERISA. *Gruby v. Brady*, 838 F. Supp. 820, 829 (S.D.N.Y. 1993). Rather, they must ignore illegal plan terms when construing the plan. *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995); *Air Line Pilots Ass'n Int'l v. Delta Air Lines, Inc.*, 863 F.2d 87, 96 (D.C. Cir. 1988); *Ches v. Archer*, 827 F. Supp. 159, 165 (W.D.N.Y. 1993); *Arakelian*

v. National Western Life Ins. Co., 755 F. Supp. 1080, 1084 n.3 (D.D.C. 1990).

A review of *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421 (M.D. Ala. 1990), which also involved a failed "top hat" plan, illustrates this approach. Because there was no plan document in that case, the court had to first determine the amount of promised benefits and then calculate the present value of what had been promised. In doing so, the court expressly rejected the employer's argument that it should be allowed to create a new plan that would have reduced the employer's liability to less than what had already been promised. Rather, the remedy was the present value of the promised benefit. *Id.* at 1426.

The Fifth Circuit decision in the present case conflicts with *Hollingshead* by essentially permitting the employer to include an illegal forfeiture provision in a plan, terminate the plan and forfeit benefits, and when a claim for benefits is made, rewrite the plan and pay the participants a small fraction of the amounts they had been promised.

This ruling thwarts the purpose of ERISA (to protect the expectation of promised retirement benefits) and gives employers incentives to violate ERISA with impunity. Simply adding an illegal forfeiture provision to an ERISA plan allows employers to avoid any claim for benefits by adopting a new plan (even post-termination) containing reduced retirement benefits and terms not previously disclosed to the plan participants. This is why ERISA and all other opinions establish that illegal terms are unenforceable and that a

plan must be given effect without reference to its illegal provisions.

B. The Fifth Circuit Decision Violates Critical ERISA Principles This Court Has Affirmed.

The Fifth Circuit's decision also violates principles this Court established in *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985). In *Central States* this Court reiterated the policy concerns behind ERISA: to protect the continued well-being and security of employees and their dependents directly affected by ERISA plans. One of ERISA's principal purposes is to ensure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain the vested benefit—he actually will receive it. 472 U.S. at 569. In the present case, the plaintiffs satisfied the lawful conditions for receipt of their benefits. They are thus entitled to the present value of their promised benefits.

This Court recognized in *Central States* that ERISA's reporting and disclosure standards require benefit plans to furnish all participants with documents informing them of their rights and obligations under the plan. *Id.* at 572. This includes benefit statements showing their benefits at retirement. The Fifth Circuit decision in the present case errs because it awards benefits based on a hypothetical plan that the company never disclosed to the plaintiffs and that substantially reduced the retirement benefits previously promised by the lawful terms in the plan documents and benefit

statements that the company had distributed to the plaintiffs during their employment.

Applying the principles of *Central States*, the plaintiffs did not receive what they were promised, despite the fact that they satisfied the necessary conditions. To induce the plaintiffs to enroll in the plan and remain employed, Cullum distributed brochures describing the plan as "A Financial Guarantee for the 1980's and Beyond." Cullum described the plan as a way to provide for "your family's financial security." Cullum told the plaintiffs they were making an investment in the plan and that their benefits would exceed what they could accumulate in a 401(k) or IRA. Long-term participants received dozens of documents promising specific retirement benefits at age 65 so long as they remained employed and participated in the plan.

In the end, Cullum received what it bargained for—a loyal and seasoned work force—and when Randalls took over it received a windfall: it was able to terminate the plan and pay pennies on the dollar compared to what the plan's lawful terms promised.

Thus, the plaintiffs gave the company loyalty and voluntary participation in the plan, but instead of receiving the present value of what they had been promised, they were denied the protections Congress intended that they receive. Under the Fifth Circuit decision, then, employers are free to promise generous benefits, obtain loyalty from their employees based on these promises, then apply illegal forfeiture provisions to deny benefits, and the employer's only exposure will

be for the present value of the smallest benefit amounts the employer could have hypothetically promised.

C. The Fifth Circuit Decision Erroneously Gave Effect to Illegal Terms to Deny the Section 1132(a)(1)(B) Claim for Benefits.

Section 1132 of the ERISA statute as codified authorizes relief in the form of accrued benefits due under a plan. 29 U.S.C.A. § 1132(a)(1)(B) (West 1999); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53 (1987). Courts awarding benefits under ERISA section 1132 should ignore plan terms that violate ERISA.

First, section 1132 "creates a procedural mechanism for enforcing a plan participant's rights, whether predicated upon ERISA's statutory protections or upon the federal common law of contracts." *Spacek v. Maritime Ass'n ILA Pension Plan*, 134 F.3d 283, 287 (5th Cir. 1998). Illegal forfeiture provisions cannot abrogate the rights that section 1132(a)(1)(B) creates.

Second, ERISA embodies the common law of trusts, which applies to the extent compatible with ERISA. *See Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). At common law, courts enforcing an otherwise valid trust omit invalid terms as if they do not exist. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 211, at 131 (1992); *see In re Goff*, 812 F.2d 931, 933 (5th Cir. 1987). ERISA codifies this principle by requiring that a fiduciary must "discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan insofar as such

documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C.A. § 1104(a)(1)(D) (West 1999).

As the plan's fiduciary (21 R. 5008), Randalls had a duty to apply only those parts of the plan that comply with ERISA—and ignore any illegal provisions. *See Central States, Southeast & Southwest Areas Pension Fund*, 472 U.S. at 568 (concluding that "trust documents must generally be construed in light of ERISA's policies . . ."). Although the decision to terminate a plan does not involve a fiduciary duty, discretionary conduct implementing that decision does. *Waller v. Blue Cross of California*, 32 F.3d 1337, 1342 (9th Cir. 1994).

Here, Randalls had the discretion to determine the plaintiffs' benefits and admittedly made a "discretionary determination" of the amounts due them (Agreed Ex. 3, ¶ 13.7; 5 R. 1029; 1038-39). Therefore, ERISA required Randalls to ignore the illegal terms when calculating the plaintiffs' benefits.

Third, when one sets aside the plan's illegal terms, the benefits stated in the plan summaries and benefit statements Cullum distributed are fully accrued and nonforfeitable. ERISA requires pension plans to provide for nonforfeitable retirement benefits. 29 U.S.C.A. § 1053(a), (b) (West 1999). ERISA defines nonforfeitable benefits as promised benefits that are not subject to a lawful condition:

> The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his

> beneficiary to that part of an immediate or deferred benefit under a pension plan that arises from the participant's service, *which is unconditional*, and which is legally enforceable against the plan.

29 U.S.C.A. § 1002(19) (West 1999) (emphasis added). Because the plan does not limit plaintiffs' promised benefits with a lawful condition, such as a lawful accrual method, they are nonforfeitable as a matter of law. 29 U.S.C.A. §§ 1002(19), 1053(a), (b) (West 1999).

Additionally, the promised benefits were fully accrued under ERISA, which provides:

> The term "accrued benefit" means - (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age.

Id. § 1002(23)(A) (West 1999). The plan is a defined benefit plan because the promised benefits are stated as a specific amount and those amounts are not based solely upon the amount contributed to the participant's account and any income, expenses, gains, losses, and forfeitures of other participants' accounts that may be allocated to a participant's account. *Id.* § 1002(34), (35) (West 1999); *see Hollingshead v. Burford Equip. Co.*, 809 F. Supp. 906, 911 (M.D. Ala. 1992).

The plan's lawful terms thus unconditionally promise 100% of a specific pension benefit as an annual benefit commencing at retirement (Agreed Ex. 3 at ¶

4.1, Annex I at ¶ 3). An accrual method that complies with ERISA is a lawful condition that limits the rate at which a participant becomes entitled to his or her promised benefit. Accordingly, the promised benefits were 100% accrued under the plan's lawful terms. 29 U.S.C.A. § 1054(a), (b) (West 1999).

For example, the plan's accrual provisions have two parts. First, the plan gives a specific benefit unreduced by a lawful accrual method. Then the plan purports to eliminate the accrued benefits the first part creates. When one sets aside the second part, the first remains and is the benefit due. If the plan had said, "You will receive at retirement $1,000,000 payable in 120 monthly installments, which amount accrues 20% per year," and elsewhere said, "Notwithstanding what we said previously, no benefits accrue until the day you retire," upon the court declaring the second clause illegal, Randalls could not impose a new accrual method. The $1,000,000 is fully accrued after five years.

The same result applies here where the plan first promised a benefit and then purported to take it away. Moreover, because ERISA requires that, "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," 29 U.S.C.A. § 1102(a) (West 1999), if the accrual conditions are not stated in the plan they do not exist, and the defined benefit is unconditional and nonforfeitable. Here, the plan's lawful terms do not limit plaintiffs' promised benefits with a lawful accrual condition, and so the benefits are unconditional and nonforfeitable.

Over the years, the employer promised in the plan agreements, benefit statements, and numerous other plan summaries provided to the plaintiffs approximately $180 million worth of retirement benefits. None of the documents sets forth any lawful limitation, in the form of a ratable accrual method, on the plaintiffs' rights to benefits. Cullum's statements thereby created nonforfeitable benefits that, but for the illegal forfeiture provisions in the plan, were vested, accrued benefits. The benefits were unconditional and expressed in the form of an annual benefit commencing at normal retirement age (Agreed Exs. 90, 92; 38 R. 9376-89). *See* 29 U.S.C.A. § 1102(23)(A) (West 1999); *Spacek,* 134 F.3d at 290. Thus, the benefit amounts stated in the benefit statements were fully accrued as of plan termination date. The present value of these amounts is recoverable under section 1132(a)(1)(B). The Fifth Circuit erred in denying these benefits.

Because plaintiffs have a valid remedy under 29 U.S.C. § 1132(a)(1), the Fifth Circuit erred by resorting to 29 U.S.C. 1132(a)(3)(B) to provide "other appropriate equitable relief." *Varity Corp. v. Howe*, 516 U.S. 489, 512, 515 (1996); *Rhorer v. Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999); *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 610-11 (5th Cir. 1998).

CONCLUSION

Although plaintiffs' arguments involve merely a straightforward application of ERISA and the cases construing 29 U.S.C. § 1104(a)(1)(D) to the lawful terms of the plan, neither the trial or appellate court explained its rationale for rejecting these arguments and holding that the plan's illegal terms were enforceable to defeat plaintiffs' claim under 29 U.S.C. § 1132(a)(1)(B). Because the Fifth Circuit's holding conflicts with the Third Circuit's holding on this critical issue under an important federal statute—and violates critical ERISA principles this Court has affirmed—the petition for a writ of certiorari should be granted.

—

Respectfully submitted,

WILLIAM WHITEHILL
(Counsel of Record)
ROBERT WRIGHT
STACY OBENHAUS
GARDERE WYNNE SEWELL LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4761
(214) 999-3000

COUNSEL FOR PETITIONERS